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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

RAOUL CRUZ,

PETITIONER

v.

MARINE TRANSPORT LINES, INC.

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Suits in Admiralty Act, 46 U.S.C. 741 and the Public Vessels Act, 46 U.S.C. 781, oust plaintiff of his right as a crew member to sue his employer under the Jones Act, 46 U.S.C. 688, et seq. depriving him of a three years Statute of Limitations and a right to a jury trial.

Whether the Government may interpose itself as an exclusive culpable party under the Suits in Admiralty Act, 46 U.S.C. 741 and the Public Vessels Act, 46 U.S.C. 781, when the Government is the scrivener of the operating contract and that contract is devoid of explicit or implicit designation of Marine Transport Lines, Inc. as an agent of the Government.

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OPINION BELOW

No opinion was filed in the Court of Appeals for the Third Circuit. The Judgment Order appears in the Appendix hereto. The opinion rendered by the United States District Court for the District of New Jersey is not reported.

The opinion appears in the Appendix hereto.

JURISDICTION

The Judgment of the Court of Appeals for the Third Circuit was entered on November 17, 1986. This Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

46 U.S.C. §745 (Suits in Admiralty Act) provides: Suits herein [in 46 USCS §§741 et seq.] authorized may be brought only within two years after the cause of action arises: Provided, That where a remedy is provided by this Act [46 USCS

§§741 et seq.] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States.

STATEMENT OF THE CASE

Raoul Cruz, the plaintiff-petitioner, was an able-bodied seaman and a member of the crew of the USNS Sealift Pacific. He was an employee of the defendant Marine Transport Lines, Inc. (hereinafter referred to as MTL) and had been hired through the rotation hiring system pursuant to a collective bargaining agreement between MTL and the National Maritime Union.

MTL had been a party to a contract with the Government entered into on May 7, 1974. The contract, except for appendices and attachments, was duplicated as Volume II of the Joint Appendix in the appeal below. The agreement will hereinafter be called "the Contract".

The tankers had been bareboat chartered to the Government before being delivered to MTL as the Contractor. Article 2 of the Contract, dealing with the status of vessels, clearly defined in the Contract that the tankers would be termed and considered as public vessels.[1] Article 7 of the Contract makes it clear that the crew of the tanker shall remain the servants of the Contractor at all times during the period of the Contract (K6). A sharp distinction is drawn between such people as the Government may place aboard, namely passengers, officers and/or enlisted men, Super-cargo and other military personnel.

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[1]Pages in Volume II of the Joint Appendix was designated with a prefix of "K" to the page number, thus the public vessel status will be found at K2.

Under those circumstances, special compensatory provisions are invoked. MTL has a responsibility of directing, controlling, victualling and navigating the vessel, and otherwise fulfilling the requirements which would, pursuant to statute, be considered under the law to deem MTL an owner pro hac vice of the vessel with all the plenary rights of an owner pro hac vice, including the right to sue out in admiralty, exoneration and limitations of liability.[2] Other portions of the Contract will be discussed in the course of Argument as they are deemed applicable.

On or about August 5, 1982, Cruz, as an able-bodied seaman aboard the USNS Sealift Pacific, a tanker vessel, was ordered by one of the ship's officers to

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[2] 46 U.S.C. 186

assist in raising a pump from the No. 1 port tank via use of the line attached to the pump. The members of the crew including Cruz who were assigned to this task requested that the hose lines supplying the chemicals to the lines of the pump be disconnected. The request was refused. One of the hoses broke, spraying the chemicals into plaintiff's face, eyes and his clothing (16a). As a result, Cruz suffered injuries to his eyes and chemical burns to his body for which continuing medical care has been required. Cruz changed counsel and shortly before the two-year anniversary of his injuries, present counsel filed suit against the United States of America in the United States District Court for the Northern District of California (31a). Counsel in San Francisco, California, was entrusted with the task

of filing suit and perfecting "forthwith" service. Suit was filed; however, service was not perfected to the satisfaction of the court. While San Francisco counsel stated that he had entrusted this to a messenger, the proof of such service was fundamentally deficient.

A hearing as to why the action should not be dismissed on the grounds of non prosquendum was ordered by the Honorable John P. Vukasin. Present counsel appeared before Judge Vukasin and was given permission to reinstitute service. Service was reinstated. The Government filed a Motion to Dismiss on the grounds that service having not been made forthwith, under the requirements embodied in the Suits in Admiralty Act, 46 U.S.C. 741, et seq., the United States District Court for the Northern District

of California was without jurisdiction. Judge Vukasin indicated that he would dismiss the action and invited the Government to submit a form of Order. The form of Order by the Government provided for dismissal with prejudice, albeit on the grounds of lack of jurisdiction. It was submitted over the objections of present counsel. Appeal was timely taken as to the form of the Order on the basis that the Court could not dismiss with prejudice. This appeal was later withdrawn with the consent of the Government in order to proceed with the instant case.

The suit against MTL was brought under the General Maritime and Admiralty Law of the United States of America and the Jones Act, 46 U.S.C. 688, et seq. in the United States District Court for the

Notice of Motion and Order by the United States Government was filed on September 13, 1985 pursuant to Rules 12(b)(1) and 12(b)(6) and/or Rule 56 of the Federal Rules of Civil Procedure dismissing plaintiff's Complaint and, in the alternative, transfer under 28 U.S.C. 1404(a) to the United States District Court for the Northern District of California.

The thrust of the Government's Motion was that the USNS Sealift Pacific was a public vessel of the United States and that on July 31, 1984 plaintiff had commenced an action under the Public Vessels Act, 46 U.S.C. 781, et seq., against the United States of America (hereinafter referred to as "the Government") in the United States District Court for the Northern District of Califorinia claiming damages for an

injury on August 5, 1982; that plaintiff had failed to comply with the "forthwith service" requirements of the Suits in Admiralty Act, 46 U.S.C. 742, which is incorporated in the Public Vessels Act, 46 U.S.C. 781, et seq.

The Motion further claimed that MTL, the defendant in the instant action, was an agent or contract operator for the Government of the USNS Sealift Pacific and that plaintiff's exclusive remedy lie against the Government under the Public Vessels Act.

Plaintiff answered in accordance with local practice in the form of a Memorandum of Law Contra Motion of the United States of America to Dismiss or For Change of Venue. The Answer points out to the Court that the record submitted by the Government on behalf of MTL did not include the actual contract

by the United States and MTL. It averred that the status of the United States in a Jones Act case is that of an interposer and not a sovereign waiving immunity; that MTL was an independent contractor entrusted with operating a vessel on behalf of the United States; that MTL was a contractor which manned, victualled, navigated, and hired and fired crew pursuant to a collective bargaining agreement with the National Maritime Union; that MTL was thereby under appropriate statutes of the United States an owner pro hac vice and as such with plenary power to sue for limitation of liability under appropriate circumstances, 46 U.S.C. 186. The Answer raised the issue that the Merchant Marine Act of 1920, which is popularly called the Jones Act, 46 U.S.C. 688, et seq., was passed three months subsequent to the

Suits in Admiralty Act and that the legislative history and the language of the Suits in Admiralty Act did not contemplate a curtailment of the right of a crew member under that Act.

In addition, a plea was made to the Court under Rule 56(f) of the Federal Rules of Civil Procedure to complete the record inasmuch as the Government had sought alternative relief under Rule 56 of the Federal Rules of Civil Procedure. A hearing was held by the Honorable John W. Bissel, United States District Judge in the District of New Jersey, and the Government was ordered to provide the contract and further briefing was required therafter.

Upon receipt of the Memoranda of Law relating to the operating contract the Honorable John W. Bissel on March 25, 1986 entered an Opinion and Order

granting a summary judgment on the basis that case law clearly established that MTL was an agent of the United States and that plaintiff's exclusive remedy for injuries sustained aboard the USNS Sealift Pacific lies against the United States.

On April 23, 1986 plaintiff timely filed a Notice of Appeal. The Court of Appeals for the Third Circuit affirmed the action of the Court below by Memorandum Order.

REASON FOR GRANTING THE WRIT

I.

The decision in the instant case is in conflict with the legislative injunction that the existing rights of seamen not be affected by the Suits in Admiralty Act.

It is important to consider the legislative history of the 1950 amendment

to the Suits in Admiralty Act which added the exclusivity provision in 46 U.S.C.A. §745. The report by the Senate committee on the Judiciary contained this language:

> "This bill will not in any way change the existing rights of seamen, under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate, under bareboat charter or similar arrangements, vessels which are merely owned by the Government." S.Rep. No. 2535, 81st Cong., 2d Sess. (1950), 1951 Am.Mar. Cases 149-150.

After the enactment of the Suits in Admiralty Act, 46 U.S.C. 741, it was determined that where seamen were concerned, the Suits in Admiralty Act should be perceived through a different lens. The eminent jurist, Judge Learned Hand in Grillea v. United States, 232 F.2d, 919 (2nd Cir. 1956), said

> "We are to remember that the Suits in Admiralty Act is not to be construed with the same jealousy that ordinarily circumscribes the consent of the United States to be sued and that, moreover, it is in general true that statutes affecting the interest of seamen, enjoy a particularly latitudinary interpretation."

Marine Transport Lines, Inc. (hereinafter referred to as MTL) is a natural, culpable and obvious defendant under the Jones Act, 46 U.S.C. 688, et seq.. A fair interpretation is to honor the three year limitation of the Jones Act. Absent the interposition by the Government, a suit against MTL is timely. The rationale for the interposition of the Government is that MTL is an agent of the Government. The full scale of activities entrusted to MTL indicates and demonstrates to the contrary that it is an independent contractor.

It is obvious from the Contract that in the instant case, the United States wears two hats. One hat is that of a bareboat charterer. The second hat is that of a time charterer.

MTL, by virtue of a contract with the United States Government, becomes the bareboat charterer of the vessel and the United States Government becomes a time charterer. All the indicia of a bareboat charterer as to MTL are present.

MTL engages and employs the personnel necessary to fill the complement of the vessel (K6, et seq.). The Contract specifically specifies in Article 7 on page 6 that such personnel shall remain the contractor's servants at all times during the period of this Contract.

The contractor provides for shore support for the vessels. See page 5

where the contractor must engage and employ qualified port engineers. The contractor selects husbanding agents at U.S. and overseas ports (page 13).

On page 20 of the Contract, it provides that the Contractor shall be responsible for the full cost of maintenance and repairs which can reasonably be accomplished by the tankers' crew. It is implicit in the Contract that the contractor feeds and provides housekeeping and shelter to the crew it has put aboard this vessel. It provides for the navigation of the vessel.

On page 8 of the Contract, it is required that the contractor provide night relief engineers and night relief mates when the vessel is in port.

This Contract was signed on March 16, 1982. It is interesting that nowhere

in the Contract is MTL defined as an agent of the United States. In view of the long background of litigation, it would have been a simple task to have simply set forth that for the purposes of this Contract MTL is an "agent" of the United States.

It is respectfully submitted that the omission of the word "agent" and the ubiquitous use of the word "contractor" instead is no accident. The very phrase "fiduciary capacity" which was first used In Re Petition of the United States, 367 F.2d 505 (3rd Cir. 1966) and in which the trial court echoed is not reflected in the Contract. The Government repeatedly in the Contract forestalls any design to permit MTL to be anything other than an independent contractor. The word "agent" is no stranger to the Contract but not as it applies to MTL. Article 11 dealing

with agents at page 13 of the Contract restricts MTL in its selection of husbanding agents for the vessel:

> "ARTICLE 11. AGENTS
>
> The Contractor shall exercise due diligence in the selection of husbanding agents at U.S. and overseas ports. The employment of such agents shall be subject to approval of the Government, which approval shall not be unreasonably withheld. The Contractor shall submit to the Government, for its approval, the name of each agent it proposes to employ as soon as practicable."

Article 24 relating to third party liability does not support the Government's position that all judgments are paid by the Government either directly or indirectly. Unlike hull and machinery insurance (see K22) which a contractor may not procure, the Contract does not prohibit the contractor from obtaining additional insurance and there

is no question that in the liability of third persons, there is an intertwining of responsibility between the Government and the contractor presumably within the interest of the contracting officer to foster such intertwining.

The Contract is important in that it emphasizes reluctance on the part of the Government to title the contractor as an agent of the United States. It seems to prefer to have the courts extend that mantle upon the urging of Government counsel.

An important difference between the contract that bound Mathiasen Tanker Industries, Inc., In Re Petition of the United States, 367 F. 2d 505 (3rd Cir. 1966) to the Government and the Contract in the instant case is that in the former circumstances it was a cost-plus contract so much so that this Court at 367 F.2d

505, 510 stressed that the wages of the crew and the costs of operating the ship, though originally paid by Mathiasen, were reimbursable by the Government. The Contract in the instant case, except for special charges not related to the operating costs or the wages of the crew, is not a cost-plus contract.[3]

There is a fair implication that the Government was the scrivener of the Contract. More precision is not possible because the court below, despite request of counsel, was not afforded discovery under Rule 56(f) of the Federal Rules of

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[3] At 24a of the Joint Appendix this is admitted by the Government:

> "Marine Transport Lines (MTL) operates the USNS SEALIFT PACIFIC on our behalf as a public vessel pursuant to a fixed price contract with certain reimbursables...."

Civil Procedure. This is not to say that mere appellations of the Contract define status definitively. They do, however, go a long way to illuminate the intent of the parties. The absence of the appellation "agent" does indicate the reluctance of the Government except as an impediment to a seaman seeking his rights under the Jones Act to afford MTL that status.

In Petition of the United States, 155 F.Supp. 714, (D.Del. 1957), the status of Mathiasen Tanker Industries, Inc. as a result of the collision of the USNS Mission San Francisco and SS Elna II on March 7, 1957, was fully examined insofar as Mathiasen was an owner pro hac vice with the right to sue out Limitation of Liability and/or Exoneration. The court found that Mathiasen was a charterer who manned, victualled and

navigated the vessel. That is the statutory language, "manned, victualled and navigated", the fulfillment of which made such contractor or charterer an owner pro hac vice. It was complained that Mathiasen should not be accorded the right to petition to limit liability on the basis that Mathiasen was a party to a cost-plus contract. Looking instead to the realities of the circumstances, the Court found that Mathiasen had manned, victualled and navigated the vessel within the clear meaning of those words as utilized in 46 U.S.C. 186. Thus, Mathiasen was accorded the right as an owner pro hac vice to resort to the right to sue out Exoneration or Limitations of Liability as an owner pro hac vice as to its putative liability under the Jones Act for injuries to crew members.

The trial court found that MTL was an agent of the United States and on that basis applied the above-stated concept of law and thereafter granted the United States its Motion for Summary Judgment. Much of the opinion of the court below is devoted to this court's discussion of the law applying to Mathiasen Tanker Industries, Inc. which was the contract operator of the USNS Mission San Francisco when it collided with the SS Elna II on March 7, 1957 on the Delaware River between Pea Patch Island and New Castle, Delaware. This unfortunate collision engendered much litigation: the Petition of the United States, 155 F.2d 714, (D.Del. 1957); In Re Petition of Oskar Teidemann and Company, 259 F.2d 605 (3rd Cir. 1958); In Re Petition of the United States of America, 259 F.2d 608 (3rd Cir. 1958); and, lastly, In Re

Petition of the United States, 367 F.2d 505 (3rd Cir. 1966).

In the latter case the court held as to Mathiasen:

> "As a matter of legal definition, 'agent' of the United States is an appropriate characterization of such a contract operator of a public vessel as Mathiasen. The accepted distinction between 'servant' and 'independent contractor' may place Mathiasen in the latter category, since it is arguable that Mathiasen's day to day working of the ship was not subject to government control. See Restatement, Agency, 2d, § 2. But an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf. Restatement, Agency, 2d § 14 N.
>
> [6] Certainly, under the contract in this case Mathiasen owed the United States obedience and loyalty and was in significant ways subject to

> the government's direction and control....While Mathiasen undertook to 'man, victual and navigate' the ships, the government was empowered 'to terminate the employment of the master or any member of the crew' as the public interest might dictate. Wages of the crew and all costs of operating the ships, though paid by Mathiasen, were reimbursable by the government. We think the general sense and specific details of this agreement disclose a relation of principal and agent within the accepted legal conception of an agency relationship." (Emphasis Supplied).

In Chowaniec v. United States, 149 F.Supp. 251 (S.D.N.Y. 1956) in which a seaman brought a proceeding in admiralty against the Government and a Jones Act suit against Marine Transport Lines, Inc., the District Court found no unseaworthiness and therefore dismissed as to the United States, but held Marine Transport Lines, Inc. liable under the Jones Act for negligence. The court there found that the owner of the vessel,

pro hac vice, namely Marine Transport Lines, Inc., operated, managed and controlled the vessel under contract with the United States as an independent contractor and hence was liable under the Jones Act.

II.

The Action of the Court below has unconstitutionally thwarted the right of a seaman to sue his employer under the Jones Act, 46 U.S.C. 688, et seq.

A challenge to the constitutionality of the Jones Act was rejected by the U.S. Supreme Court when in Panama Railroad Co. v. Johnson, 264 U.S. 375, 60 L.Ed. 748, 44 S.Ct. 391 (1924), the Act was recognized as a broadening of the rights of seamen within the Constitutional prerogatives of Congress. This broadening of the remedy afforded by the Jones Act should not be truncated in

procrustean style to fit the framework of the Suits in Admiralty Act and the Public Vessels Act.[4] The Jones Act afforded a seaman three years in which to bring his claim;[5] it gives him the right of a jury trial; it gives him a liberal causation standard as opposed to shore-bound proximate cause; and permits state courts unremovable jurisdiction.[6]

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[4] Procrustes was the mythological innkeeper who had but one bed and by stretching or amputation would match the bed to the patron.

[5] The Limitation Period was extended from two years to three years by statute on August 11, 1939 by amendment to the underlying Federal Employers Liability Act, 45 U.S.C. §56.

[6] 28 U.S.C. §1445

The Suits in Admiralty Act[7] grew out of legislation that had preceded it, creating the United States Shipping Board in 1916.[8] That statute provided that vessels purchased, chartered or leased from the Board, while employed solely as merchant vessels would be subject to all laws, regulations and liabilities governing merchant vessels whether the United States was interested in them as owner in whole or in part, or held any mortgage lien or other interest in the property. See Norris, The Law of Seaman, Third Edition, at page 220. The 1916 Act, however, was construed to remit seizure of government vessels that were

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[7] The Act of March 9, 1920 c 95, 41 Stat. 525, 46 U.S.C. §741, et seq.

[8] The Act of September 7, 1916 c 451, 39 Stt. 728, 46 U.S.C. §801, et seq.

in the merchant service. Lawsuits brought in rem were embarrassing and intolerable.[9]

The Suits in Admiralty Act, which explicitly prohibits the arrest or seizure by jurisdictional process of any vessel or cargo owned by the United States, gave a litigant the right to sue the United States in personam instead of the right of suit in rem. As Norris points out at page 221 of his text, the intent of the Suits in Admiralty Act was to impose upon the United States the same liability as is imposed by the Admiralty Law on the private shipowner. Liability of the Government in a lawsuit in admiralty had to be predicated upon its

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9 The Lake Monroe, 250 U.S. 246, 63 L.Ed. 962, 39 S.Ct. 460 (1919). See also: Ryan Stevedoring Co. v. United States, 175 F.2d, 490 1949 AMC 1363 (CA2 NY 1949), cert den. 338 US 899, 94 L.Ed. 53, 70 S.Ct. 249

activity as a shipowner in connection with the vessel.

On the other hand, the Public Vessels Act[10] was designed to provide a remedy against the United States Government for damages arising out of operations of its public vessels. In Olavarria and Co. v. United States, 56 F.Supp. 758, 1944 AMC 1159 (Ala. 1944), the court said:

> "This Court cannot escape the conclusion that under the Suits in Admiralty Act the sovereign was placed on the same plane with the private operator whenever it entered the business of operating ships in the merchant service. If its agents or operators, through negligence or otherwise, injure its citizens in carrying on such a business, the sovereign assumes the same responsibilities that rest upon its subjects who are engaged in carrying merchandise on the high seas for hire."

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[10] Act of March 3, 1925 c 428, 43 Stat. 112, 46 U.S.C. §781, et seq.

The passage of the Jones Act followed the Suits in Admiralty Act by some three months. Clyde-Mallory Lines v. The Eglantine, 317 U.S. 395, 398 (1943). The Jones Act itself gave seamen as members of the crew of a vessel a cause of action against the shipowner, incorporating by reference the Federal Employers Liability Act, 45 U.S.C. §51, et seq.

The weighing of appropriate statutes of limitation was the issue in Clyde-Mallory Lines v. The Eglantine, supra. In that case The Eglantine, while it was being operated by the United States as a merchant vessel, collided with a vessel operated by Clyde-Mallory Lines in 1932. Effective at that time was the Suits in Admiralty Act. Section 5 of the Suits in Admiralty Act imposed a two-year statute of limitations. Section

9 of the Shipping Act of 1916, 39 Stat. 728, permitted enforcement of liens against Government merchant vessels subject to all the laws, regulations and liabilities which governed merchant vessels generally. The Maritime Law imposes a lien and provides for enforcement of those liens against the vessels themselves. The aforementioned Shipping Act of 1916 contained no statute of limitation, but in accordance with admiralty practice the general rules of laches applied. Section 9 of the Shipping Act of 1916, 39 Stat. 728, was carried forward and became a part of §18 of the Merchant Marine Act of 1920, 46 U.S.C. §808.

On the other hand, §4 of the Suits in Admiralty Act, 46 U.S.C. 704, permitted the government to interpose

itself in a proceeding against a vessel which it had owned and thereafter transferred or alienated. Section 5 of the Suits in Admiralty Act sets forth a two-year statute of limitations, 46 U.S.C. 705.

Clyde-Mallory Lines had brought an action against the private operator of The Eglantine some four and one-half years after the collision. The Government intervened and the issue travelled up the appellate ladder to the United States Supreme Court. In an Opinion by Justice Black, the Supreme Court found that the two-year statute of limitations was applicable after the government intervened, pointing out that §4 of the Suits in Admiralty Act was a statute specially designed by Congress to cut off lingering liens, whereas the re-enactment of §9 of the Shipping Act of

1916, 39 Stat. 728, was a circumstance without any focus on this particular problem.

This we see from Clyde-Mallory Lines v. The Eglantine, supra, that an analysis of the purpose of the varying statutes of limitations is in order. There is no automatic scythe-like resolution.

Railroad workers and crew members of vessels in navigation as set forth in 45 U.S.C. §51, et seq. and 46 U.S.C. 688, et seq., are permitted to sue their emplcyers as a compensation scheme in lieu of workmen's compensation.

However, if a the crew of a vessel are government employees, they are restricted to the Federal Employees Compensation Act. [11] It is an exclusive

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[11] 5 U.S.C. 8101, et seq.

remedy and the Jones Act does not apply.

The Government defined the status of the crew members on the vessel as being servants of MTL. That legal status, like that of "public vessel", was sharply defined. The Contract while it uses the word "agent" in other contexts never defines MTL as anything other than a contractor.

The curtailment of the full statutory period for a crew member to bring a suit against his employer thereby diminishes his rights. This is not the situation in which the Government, waiving its right of sovereign immunity, has the right to dictate the terms under which such waiver is effectuated. In this case the Government is an interposer. It places itself without legislative warrant between the seaman crew member and his employer. All the

case law parroting the doctrine that the jurisdiction of the courts is dependent upon strict application of a statute waiving sovereign immunity lose their thrust of reason. In the instant case it is the Government attempting to make an agent of MTL, albeit the weather vanes in the Contract point in the opposite direction.

The Court of Appeals for the Third Circuit held in Crescitelli v. United States, 159 F.2d 377 (3rd Cir. 1947),[12] held that the two-year statute of limitation period of the Suits in Admiralty Act applied to actions brought against the United States Government, albeit under the Jones Act, 46 U.S.C.

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[12] The Crescitelli Court based its decisionon Kukara v. United States, 157 F.2d 578, (9th Cir. 1946). In Kukara the Court held that the action was truly brought under the Clarification Act of March 24, 1943, P.L. 17, 57 Stat. 45, 50 U.S.C.A. Appendix §291.

688, et seq. In that case the suit was against the United States. A direct suit against the United States carries with it the baggage of the conditions under which the United States consents to be sued. We respectfully submit that a suit against an owner pro hac vice by a seaman crew member under the Jones Act carries with it no such baggage. As was pointed out in Eastern Steamship Lines, Inc. v. United States, 187 F.2d 196, (1st Cir. 1951), the general purpose of 46 U.S.C. 741, et seq., both from the statutory language and the legislative history in the United States was for the United States to be relieved of the inconvenience of having its vessels seized by judicial process and otherwise to be treated as private shipping companies with respect to liabilities arising out of operations of the vessel

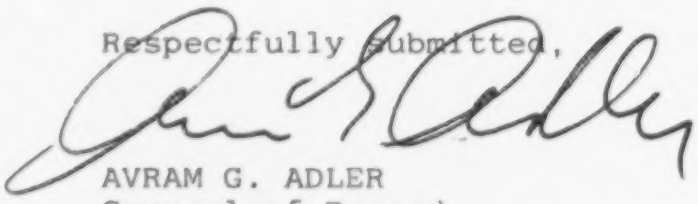
and, more important, to provide an action in personnam. When the Government chose to seek and receive a dismissal of Cruz' action against the Government, with prejudice, albeit the basis for dismissal was one of subject matter jurisdiction by reason of the dereliction in service, then it shut out that remedy and forfeited its status to interpose itself in a lawsuit against MTL.

In sum total, the broad reach of the Congressional grant of a comprehensive statutory compensation scheme for seamen is sharply truncated and diminished by the misapplication of the Suits in Admiralty Act and the Public Vessels Act by a tortuous definition of what constitutes an agent of the United States.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,



AVRAM G. ADLER
Counsel of Record

ADLER AND KOPS
Attorneys for Petitioner

APPENDIX A - OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED MARCH 25, 1986

IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action 85-3833 (JWB)

RAOUL CRUZ

vs.

MARINE TRANSPORT LINES, INC.

ORDER

The United States of America, having appeared on its behalf, and on the behalf of its agent, the defendant Marine Transport Lines, Inc., and having moved for an Order to dismiss the complaint for lack of subject matter jurisdiction by this Honorable Court over the plaintiff's action against the defendant Marine Transport Lines, Inc. pursuant to the exclusivity provision of 46 U.S.C. §745 of the Suits in Admiralty Act, or in the

APPENDIX A

alternative for summary judgment dismissing the complaint by reason of the action being time barred, thereby depriving the Court of subject matter jurisdiction and the motion having come on to be heard on the 15th day of October 1985.

The Court having ruled that in fact and in law, plaintiff does not have a cause of action against defendant, Marine Transport Lines, Inc. as the plaintiff's exclusive remedy for the matters alleged in the complaint was an action against defendant, Marine Transport Lines, Inc. as the plaintiff's exclusive remedy for the matters alleged in the complaint was an action against the United States of America in accordance with 46 U.S.C. §745, thereby depriving this Court of subject matter jurisdiction herein, and further,

APPENDIX A

The action of plaintiff arose more than two years ago prior to the commencement of this action and was time barred pursuant to 46 U.S.C. §745, which is incorporated in the Public Vessels Act, 46 U.S.C. §781-790, and further,

ORDERED that the motion of the United States of America to dismiss or for summary judgment is hereby granted, and it is further

FURTHER ORDERED that plaintiff Raoul Cruz's action herein against defendant Marine Transport Lines, Inc., be and is hereby dismissed with prejudice and with costs.

J. BISSEL
U.S.D.J.

Dated: Newark, New Jersey
March 25,1986

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 85-3833

RAOUL CRUZ

v.

MARINE TRANSPORT LINES, INC.

OPINION

This matter arises out of a complaint filed on August 1, 1985 by Raoul Cruz, a merchant seaman in the United States Merchant Marine and a resident of San Francisco, against Marine Transport Lines, Inc. ("Marine Transport" or "MTL"). Jurisdiction is predicated on the General Maritime and Admiralty Law of the United States as modified by the Jones Act, 46 U.S.C. §688 et seq. Defendant Marine Transport is a Delaware corporation having its principal place of business in New Jersey. In his

complaint, plaintiff asserts that during his employ by Marine Transport as a crew member of the United States Naval Ship ("USNS") Sealift Pacific, on or about August 5, 1982, he was injured as a result of the negligence of defendant and the unseaworthiness of the Sealift Pacific. More specifically, he allegedly suffered injuries to his eyes, chemical burns on his body and shock when hoses connected to a pump which he was raising broke, spraying chemicals on his face and body. Plaintiff seeks $20,000 in damages.

Prior to this action, on July 31, 1984, plaintiff filed suit in the Northern District of California under the Public Vessels Act, 46 U.S.C. §§781-790, against the United States, the owner of the USNS Sealift Pacific, for the same alleged injuries. Because plaintiff

failed to comply with the "forthwith service" requirements of 46 U.S.C. §742, that action, which was then time barred, was dismissed on March 27, 1985 for lack of jurisdiction. Plaintiff appealed the district court's decision to the Ninth Circuit but later withdrew that appeal on September 5, 1985.

The United States, on behalf of its alleged agent, Marine Transport, moves for summary judgment pursuant to Fed.R.Civ.P. 56, asserting that this Court lacks subject matter jurisdiction under the exclusivity provision of 46 U.S.C. §745, the Suits in Admiralty Act, and that plaintiff fails to state a claim upon which relief can be granted. Alternatively, if summary judgment is denied, the United States requests that this action be transferred to the Northern District of California pursuant

to 46 U.S.C. §782 or 28 U.S.C. §1404(a). Lastly, the movant seeks the imposition of sanctions against plaintiff under Fed.R.Civ.P. 11.

The Court heard oral argument on November 25, 1985 but, upon plaintiff's request, reserved decision on the motion for summary judgment until after the Court had an opportunity to review the contract between the United States and Marine Transport.

The Court first addresses the argument raised by plaintiff that the United States, as a non-party to the suit, does not have standing to bring this motion. A similar issue was discussed in Carter v. American Export Isbrandtsen Lines, Inc., 411 F.2d 1185 (2d Cir. 1969). There, the motion for summary judgment was brought by the defendant contract operator, American

Export Lines, Inc. However, defendant was represented by government attorneys, a procedure which the plaintiff deemed improper. The Second Circuit disagreed, stating,

> 28 U.S.C. §547 provides that the United States Attorney shall defend "all civil actions, suits or proceedings in which the United States is concerned" which arise in his district. Since American Export was the agent of the United States, the representation was proper.

Id. at 1186. Applying the Carter ruling to the case at bar, the Court finds that since Marine Transport is the agent of the United States, as discussed infra, the filing of the within motion by the United States is proper.

Certain facts are undisputed by the parties. Both accept that from June 15, 1974 to the present, the USNS Sealift

Pacific has been a public vessel of the United States under a bareboat charter to the Government, engaged in the worldwide transportation of petroleum products for the United States Department of Defense. It is also uncontested that plaintiff Raoul Cruz was employed as a crew member of the Sealift Pacific when he was allegedly injured on August 5, 1982. The vessel was at sea on that date and called at Guam on August 9, 1982 where plaintiff was treated.

The parties do disagree on whether or not Marine Transport has been the agent of the United States as its vessel contract operator for the USNS Sealift Pacific. Movant states that it contracted with MTL to act as its vessel operator pursuant to a fixed price contract (United States' Brief at 3-4) and that Marine transport has been its

agent prior to August 5, 1982 until the present (United States' Statement of Uncontested Material Facts at ¶2).

The crux of the United States' argument on the dismissal issue is that defendant MTL was acting as the United States' agent and that "[s]eamen's actions, such as plaintiff's, must be filed under the Public Vessels Act, 46 U.S.C. §§781-790, which incorporates by reference the Suits in Admiralty Act, 46 U.S.C. §§741-752 [and] may be commenced only against the United States and not against its agents. Carter v. American Export Isbandtsen Lines, Inc., 411 F.2d 1185 (2d Cir. 1969)." (United States' Brief at 4).

In Carter, supra, the Second Circuit held that because plaintiff seaman, allegedly injured on a public vessel of the United States, had an adequate remedy

against the United States under the Public Vessels Act and the Suits in Admiralty Act, his sole remedy was against the United States, not against defendant, the operator of that public vessel and the agent of the United States.

A seaman's remedy against the United States is provided in the Public Vessels Act, 46 U.S.C. §§781-790, which establishes that a libel in personam may be brought against the United States in cases involving public vessels. 46 U.S.C. §781. The Public Vessels Act incorporates by reference the provisions of the Suits in Admiralty Act, 46 U.S.C. §§741-752. 46 U.S.C. §782. Section 742 makes available a libel in personam against the United States in any case in which a proceeding in admiralty could have been maintained against a privately

owned vessel had it been involved. 46 U.S.C. §742. That the remedy of a seaman injured aboard a public vessel, such as the USNS Sealift Pacific, lies exclusively against the United States is provided in 46 U.S.C. §745 which reads:

> where a remedy is provided by this Act [46 USCS §§741 et seq] it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim...

In Petition of United States, 367 F.2d 505 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967), reh'g denied, 386 U.S. 1000 (1967), dealing with claims of personal injuries and deaths under the Jones Act, 46 U.S.C. §688, the court held that "by force of the exclusive liability

clause of section 745, any right to recover against the United States here for injury caused by its public vessel precludes recovery for the same injury against the contract operator whose conduct was the immediate cause of the accident." Id. at 511. See also, Smith v. United States, 346 F.2d 449 (4th Cir. 1965), cert. denied, 382 U.S. 878 (1965); Basile v. United States, Civil No. 80-2453 (D.Mass. 1982). The United States lists a full page of cites in support of this proposition. (United States' Brief at 7-8).

The caselaw clearly establishes that if MTL was indeed the agent of the United States, plaintiff's exclusive remedy for injuries allegedly sustained aboard the USNS Sealift Pacific lies against the United States and thus, the United States' motion for summary judgment must

be granted.

Plaintiff asserts that the "full scale of activities entrusted to Marine Transportation Corporation indicates and demonstrates that it is an independent contractor." (Plaintiff's Brief at 6.) The Fourth Circuit has held that an operator of a Navy tanker could still be a government agent within the meaning of 46 U.S.C. §745 whether it was a charterer, an owner pro hav vice, or an independent contractor under its agreement with the United States. Smith v. United States, supra, 346 F.2d at 453.

Also, the Third Circuit discussed this very issue in Petition of United States, supra, where it stated:

> As a matter of legal definition, "agent" of the United States is an appropriate characterization of such a contract operator of a public vessel as Mathiasen. The

> accepted distinction between "servant" and "independent contractor" may place Mathiasen in the latter category, since it is arguable that Mathiasen's day to day working of the ship was not subject to government control. See Restatement, Agency, 2d §2. But an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction in accomplishing some matter undertaken on the principal's behalf. Restatement, Agency, 2d § 14 N.

367 F.2d at 509. Therefore, the focus of this Court's inquiry is whether or not MTL acted as a fiduciary of the Government, undertaking to act on the United States' behalf, and whether it was subject to the control and direction of the United States.

In Petition of United States, the Third Circuit concluded that Mathiasen, the contractor, "owed the United States

obedience and loyalty and was in significant ways subject to the government's direction and control." Id. The contract between Mathiasen and the United States provided that Mathiasen was "to manage and conduct the business of the Government with respect to such tankers" furnished by the Government "solely in the public use or in the protection of the National interest or economy." Mathiasen agreed to "equip, fuel, supply, maintain, man, victual and navigate" the tanker. Mathiasen supplied the Master and a civilian crew. However, the Government prescribed the voyages and cargoes and maintained the power to terminate crew members. Wages of the crew and all costs of operating the ships, though initially paid by Mathiasen, were reimbursable by the Government. Before holding that

Mathiasen was an agent of the United States within the meaning of §745, the court reviewed the legislative history of that section and concluded that "agent" was broadly defined, stating, "in the Congressional view the general statement of an agency concept as enacted included any instrumentality through and by which public vessels were operated." Id. at 510.

An examination of the contract executed between the United States and Marine Transport reveals that Marine Transport indeed acted as the "agent" of the United States within the meaning of 46 U.S.C. §745 as that term was defined by the Third Circuit in Petition of United States. MTL's obligation of loyalty to the Government is evidenced by the contractual provision, similar to that in Petition of United States, that

the tankers used in the operation of the contract "shall be employed solely in the public use or in the protection of the national interest." Contract for the Operation of Sealift Class Tankers, Article 2.

The contract further demonstrates that Marine Transport operated the USNS Sealift Pacific on behalf of the United States and that MTL was subject to the Government's overall control and direction. The opening Article of the contract reads:

> The Contractor shall take possession and operate the tankers in accordance with such directions or orders as to voyages and cargoes as the Commander, Military Sealift Command, or his authorized representative, prescribes, and upon the terms and conditions herein provided.

Id. at Article 1. Further on, the

contract provides that "[t]he Contractor shall operate the tankers in such services as the Government, by written or telegraphic order may direct, including all matters relating to voyages and cargoes." Id. at Article 6(a). The parties agreed that the United States was to issue operating instructions. Id.

The extensive control of the Government over Marine Transport under the contract is exemplified by the requirement that MTL produce and provide to the Government upon request abstracts of daily entries in maintenance logs "showing care given the cargo, courses steered, distances run on each course, noon position, distance made good each day from noon to noon, consumption of fuel, and remainder of fuel in the bunkers at noon of each day, repairs and maintenance performed." Id. at Article

6(d).

The contract delegated to MTL the duty of employing personnel to man the tanker. However, the contract limited MTL's discretion in manning the tankers by explicitly setting forth the positions to be filled and the number of individuals to be hired at each position. Id. at Article 7(a). Moreover, the Government reserved to itself the right to terminate employees with whose services it was dissatisfied. Id. at Article 7(f). Similarly, employment of husbanding agents at United States and overseas ports was subject to the Government's approval. Id. at Article 11.

The affidavit of Richard Haynes, counsel to the Military Sealift Command ("MSC"), which is part of the Operating Forces of the United States Navy through

which the Sealift Pacific was bareboat chartered to the Navy, indicates that Marine Transport was subject to the Government's direction and control:

> Marine Transport Lines (MTL) operates the USNS SEALIFT PACIFIC on our behalf as a public vessel pursuant to a fixed price contract with certain reimbursables and has nothing to do with the scheduling of the vessel. Since her delivery to MSC, the USNS SEALIFT PACIFIC has been under the exclusive operational control of MSC, sailing only when and where ordered by the MSC Tanker Division.

(Haynes Aff. at ¶7).

The Court determines that even if MTL was an independent contractor as plaintiff asserts or it handled the day to day working of the ship, the relationship between the United States and Marine Transport was that of principal and agent by virtue of the

APPENDIX A

United States' "exclusive operational control" over the USNS Sealift Pacific. In conclusion, the Court holds that plaintiff Cruz's sole remedy, although now time barred, was against the United States and thus, the United States' motion for summary judgment brought on Marine Transport's behalf must be granted. It is unnecessary for the Court to address the movant's alternative motion to transfer this action. Lastly, the Court denies the United States' request that sanctions be imposed pursuant to Fed.R.Civ.P. 11 as it does not deem plaintiff's complaint to have been interposed frivolously or for an improper purpose.

/s/ J. W. Bissel
JOHN W. BISSEL
U.S.D.J.

APPENDIX B - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5267

RAOUL CRUZ,

Appellant

vs.

MARINE TRANSPORT LINES, INC.

Appeal from the United States District Court For the District of New Jersey - Newark (Civil Action No. 85-3833)
District Judge: Honorble John W. Bissell

Submitted Pursuant to Third Circuit Rule 12(6) November 6, 1986

Before: SLOVITER and STAPLETON, Circuit Judges and GREEN, District Judge

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JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

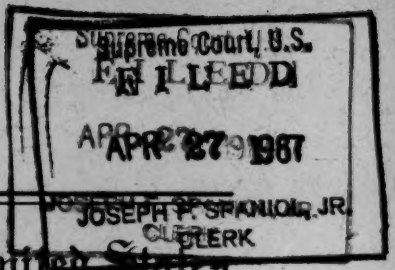
APPENDIX B

ORDERED AND ADJUDGED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

/s/ WALTER K. STAPLETON
Circuit Judge



No. 86-1358

In the Supreme Court of the United States

OCTOBER TERM, 1986

RAOUL CRUZ, PETITIONER

v.

MARINE TRANSPORT LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1358

RAOUL CRUZ, PETITIONER

v.

MARINE TRANSPORT LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner, a seaman who alleges that he suffered injuries aboard a public vessel, seeks to sue respondent, a private company that operated the vessel under contract with the United States. Petitioner challenges the lower courts' conclusion that under 46 U.S.C (Supp. III) 745 his exclusive remedy (now time-barred) was against the United States, because respondent acted as an agent of the United States.

1. The *USNS Sealift Pacific* is a public vessel used to transport petroleum products for the Department of Defense. The ship was operated by respondent Marine Transport Lines pursuant to a written agreement between it and the government. Petitioner, a civilian crew member, alleges that he was injured on the ship in August 1982 when the hoses connected to a pump broke, spraying him with chemicals. In July 1984, approximately one month before the expiration of the two-year limitation period of the

Public Vessels Act, 46 U.S.C. (Supp. III) 781 *et seq.*, petitioner brought suit against the United States under that Act. Because the summons and complaint were not served in the "forthwith" manner required by 46 U.S.C. (Supp. III) 742, the action was dismissed for lack of jurisdiction. Petitioner filed an appeal but then withdrew it.[1] Pet. App. 5a-9a.

Petitioner subsequently commenced this action against respondent under the Jones Act, 46 U.S.C. (Supp. III) 688, seeking recovery for the same injury. The government contended that 46 U.S.C. (Supp. III) 745 bars that claim.[2] Section 745 provides that "where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claim." Petitioner contended that under the facts of this case Marine Transport was not an "agent" of the United States.

The district court dismissed the complaint (Pet. App. 1a-22a). After reviewing the agreement between the government and Marine Transport, the court concluded that "Marine Transport indeed acted as the 'agent' of the United States within the meaning of 46 U.S.C. § 745" (Pet. App.

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[1]Petitioner ambiguously states that the appeal was "withdrawn with the consent of the Government in order to proceed with the instant case" (Pet. 9). It is true that the appeal was "withdrawn with the consent of the Government." But if petitioner intends to suggest by that statement that government counsel agreed that he should be permitted to proceed with this suit against Marine Transport, he is wrong, and nothing in the record supports such a claim.

[2]Section 745, which is part of the Suits in Admiralty Act, 46 U.S.C. (Supp. III) 741 *et seq.*, is incorporated by reference into the Public Vessels Act by 46 U.S.C. (Supp. III) 782, as the district court concluded (Pet. App. 11a). See, *e.g.*, *In re United States*, 367 F.2d 505, 508-509 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967).

17a). The court therefore held that, under the plain language of Section 745, petitioner's "sole remedy, although now time barred, was against the United States" (Pet. App. 22a).[3] The court of appeals affirmed without opinion (*id.* at 23a-24a).

2. Petitioner argues that the courts below incorrectly concluded that, under the terms of their agreement, Marine Transport acted as an agent of the United States within the meaning of Section 745. There is no merit to this fact-bound claim. Petitioner does not allege, nor is there, a conflict in the circuits on any question relating to how it is determined whether an operator of a vessel is an agent under Section 745. Accordingly, this case does not merit further review.

The district court correctly concluded, on the basis of the contract between the United States and respondent, that respondent acted as an agent of the United States. The contract requires operation of the vessel " 'solely in the public use or in the protection of the national interest' " (Pet. App. 18a (citation omitted)). It further provides that the government, not Marine Transport, controls all matters relating to the vessel's voyages and cargoes (*id.* at 18a-19a). As an affidavit of counsel to the Military Sealift Command (MSC) stated, the *USNS Sealift Pacific* is " 'under the

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[3]The district court also considered petitioner's contention that the United States lacked standing to argue that the suit against respondent should be dismissed. The court noted that in *Carter* v. *American Export Isbrandtsen Lines, Inc.*, 411 F.2d 1185, 1186 (2d Cir. 1969), the court stated that 28 U.S.C. 547 provides that government attorneys shall defend all civil actions in which the United States is concerned and concluded that, since the private vessel operator in that case was an agent of the United States, representation by the United States was proper. The district court here held that "since Marine Transport is the agent of the United States, * * * the filing of the within motion by the United States is proper" (Pet. App. 8a).

exclusive operational control of MSC, sailing only when and where ordered by the MSC Tanker Division' " (*id.* at 21a (citation omitted)).[4]

Petitioner contends (Pet. 16) that Marine Transport is properly characterized as an independent contractor rather than as an agent. However, as the district court concluded, "even if [Marine Transport Lines] was an independent contractor as plaintiff asserts or it handled the day to day working of the ship, the relationship between the United States and Marine Transport was that of principal and agent by virtue of the United States' 'exclusive operational control' over the USNS Sealift Pacific" (Pet. App. 21a-22a).

Other courts have similarly concluded that operators of public vessels were agents of the United States under Section 745 even if they might also be characterized as independent contractors. In *Smith* v. *United States*, 346 F.2d 449, 453-454 (4th Cir.), cert. denied, 382 U.S. 878 (1965), the plaintiff, a seaman making a Jones Act claim, alleged, as does petitioner, "a bare-boat charter out of the Government to Marine [Transport Lines, the respondent here] with a time charter back from Marine to the Government." The court held that "[w]hether the agreement constituted Marine a charterer, an owner pro hac vice or an independent contractor is merely an academic ascertainment. In any of these capacities Marine could still be an agent." *Ibid.* Similarly, in *In re United States*, 367 F.2d 505, 509 (3d Cir. 1966), cert. denied, 386 U.S. 932 (1967), the court held that "[t]he

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[4]Petitioner notes (Pet. 15) that the legislative history of Section 745 indicates that it would not bar suits against operators of vessels merely because the government owned the vessel. That is correct, but does not support petitioner's argument. As Section 745 plainly provides, suit is not barred against an operator merely because the United States owns the ship; rather, suit is barred only if the operator is an agent of the United States. Here, as the district court concluded, Marine Transport is an agent of the United States because of the government's operational control over the vessel.

accepted distinction between 'servant' and 'independent contractor' may place [the operator of the ship] in the latter category, since it is arguable that [the operator's] day to day working of the ship was not subject to government control. See Restatement, Agency, 2d, § 2. But an independent contractor, no less than a servant may be an agent in that he is employed as a fiduciary, acting for a principal with the principal's consent and subject to the principal's overall control and direction * * *. Restatement, Agency, 2d, § 14 N."[5]

Petitioner cites no case where an operator of a public vessel was not found to be an agent within the meaning of Section 745. He notes (Pet. 27-28) that in *Chowaniec* v. *United States*, 149 F. Supp. 251 (S.D.N.Y. 1956), an operator of a public vessel was found liable for an injury to a seaman. But that district court decision is irrelevant because the operator of the vessel in that case failed to argue that suit against it was barred by the exclusive remedy provision. See *Smith*, 346 F.2d at 455 n.1 (Bell, J., dissenting).

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[5]Petitioner distinguishes *In re United States*, *supra*, on the ground that the operator in that case was compensated on a cost-plus basis while Marine Transport was paid pursuant to a fixed-price contract (Pet. 21-22). But petitioner makes no attempt to explain why the mode of compensation should be dispositive in ascertaining whether a contractor is an "agent." While the Third Circuit in *In re United States* noted that the operator there was compensated on a cost-plus basis, that fact was not critical to the court's decision, which instead turned on the fact that the operator "was in significant ways subject to the government's direction and control" (367 F.2d at 509). The Third Circuit evidently does not regard its prior decision in *In re United States*, *supra*, as turning on the mode of compensation involved, since the Third Circuit also wrote the decision below. Petitioner simply suggests no reason why an operator subject in significant ways to the government's direction and control, like Marine Transport, should not be considered an agent of the United States merely because it was paid pursuant to a fixed-price contract.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

APRIL 1987